

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

JOSUE MIGUEL RIVERA-BRUNO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 09-2191 (JAF)

(Criminal No. 07-453)

**OPINION AND ORDER**

Petitioner, Josué Miguel Rivera-Bruno, brings this pro-se petition for post-conviction relief from a federal judgment pursuant to 28 U.S.C. § 2255. (Docket No. 1.) Respondent, the United States of America, opposes (Docket No. 5), and Petitioner replies (Docket No. 6).

**I.**

**Factual and Procedural History**

On October 25, 2007, Petitioner was charged with participation in a sixty-three-member conspiracy to possess with intention to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), (b)(2), 846, and 860, (1) one kilogram or more of heroin; (2) 50 grams or more of crack cocaine; (3) five kilograms or more of cocaine; (4) a detectable quantity of Oxycodone; and (5) a detectable amount of Alprazolam. (Crim. No. 07-453, Docket No. 3.) The indictment also charged Petitioner with four additional counts for aiding and abetting others in the commission of narcotics offenses in the vicinity of public housing, a primary school, and a school for deaf children in Cataño, Puerto Rico, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 860. (Id.) On August 22,

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1 2008, Petitioner was charged in a superseding indictment with the same offenses as in the original.  
2 (Crim. No. 07-453, Docket No. 1131.)

3 On September 3, 2008, Petitioner signed a plea agreement in which he agreed to plead  
4 guilty to the first count in the indictment and to the amounts of drugs stated therein. (Crim.  
5 No. 07-453, Docket No. 1246.) Under the agreement, the government and Petitioner stipulated  
6 to a base offense level of thirty, with an upward adjustment for the commission of an offense in  
7 a protected location and a downward adjustment for Petitioner's acceptance of responsibility,  
8 resulting in a total offense level of twenty-nine. (Id.) Under the sentencing guidelines, this  
9 translated to a period of incarceration of between 87 and 135 months, depending on the ultimate  
10 finding of Petitioner's criminal history. (Id.) The government and Petitioner agreed not to pursue  
11 further adjustments or departures at sentencing. (Id.) Petitioner further represented that his plea  
12 was voluntary; he was satisfied with his lawyer; he understood that the court was not bound by the  
13 sentence recommended in the agreement; and he agreed to waive his right to appeal the judgment.  
14 (Id.) In exchange, the government agreed to recommend dismissal of the remaining counts against  
15 Petitioner. (Id.)

16 On September 4, 2008, Petitioner appeared before this court at a change-of-plea hearing  
17 to plead guilty to the first count. (Crim. No. 07-453, Docket No. 1765.) We engaged in an  
18 extended colloquy to ensure the voluntariness of Petitioner's guilty plea and his awareness of the  
19 rights he relinquished. (Id.) In response to our query, Petitioner testified that he was satisfied with  
20 his counsel; he understood the waiver of his right to appeal; he agreed to the stipulated drug  
21 quantities; and he understood that the plea agreement did not permit further adjustments or  
22 departures under the sentencing guidelines. (Id.) On December 3, 2008, we entered judgment  
23 against Petitioner, sentencing him to eighty-seven months of imprisonment. (Crim. No. 07-453,

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1 Docket No. 1571.) On November 24, 2009, Petitioner moved to vacate his sentence under 28  
2 U.S.C. § 2255. (Docket No. 1.) The government opposed on January 25 (Docket No. 5), and  
3 Petitioner replied on February 24 (Docket No. 6).

## 4 II.

### 5 Standard Under Section 2255

6 A federal district court has jurisdiction to entertain a § 2255 motion when the petitioner is  
7 in custody under the sentence of a federal court. See 28 U.S.C. § 2255. Section 2255 provides  
8 four grounds under which a federal prisoner challenging the imposition or length of his sentence  
9 may obtain relief. The petitioner may show that: (1) the court imposed the sentence in violation  
10 of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose  
11 such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the  
12 sentence is otherwise subject to collateral attack. § 2255(a). Should a court find any of these  
13 errors, it “shall vacate and set the judgment aside and shall discharge the prisoner or resentence  
14 him or grant a new trial or correct the sentence as may appear appropriate.” § 2255(b). The  
15 petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled  
16 to relief. United States v. DiCarlo, 575 F.2d 952, 954 (1st Cir. 1978).

## 17 III.

### 18 Analysis

19 Because Petitioner is pro se, we construe his pleadings more favorably than we would  
20 pleadings drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). His status,  
21 however, does not insulate him from the strictures of procedural and substantive law. See Ahmed  
22 v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). Petitioner argues that his sentence is

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1 unconstitutional because he pleaded guilty without being fully advised of the rights he waived and  
2 because he received ineffective assistance of counsel. (Docket No. 1.)

3 **A. Voluntariness and Knowledge of Plea**

4 Petitioner claims that counsel induced him to plead guilty without fully explaining the  
5 consequences of forgoing requests for downward departures at sentencing and of waiving his right  
6 to appeal, and by misinforming him about the possibility of stipulating to a lower drug quantity.  
7 (Docket No. 1.) Federal Rule of Criminal Procedure 11(b) guards against coerced pleas by  
8 requiring the court to engage in an extensive colloquy to ascertain a defendant's voluntariness and  
9 awareness of his rights. While a guilty plea must be knowing, voluntary, and intelligent, if a court  
10 has accepted a defendant's plea per Rule 11, the defendant cannot go back on his own word by  
11 petitioning under § 2255. United States v. Sánchez-Barreto, 93 F.3d 17, 23 (1st Cir. 1996). If a  
12 petitioner also asserts that counsel induced him to plead guilty through factual misrepresentation,  
13 the petitioner must still make highly specific allegations, "usually accompanied by some  
14 independent corroboration," to overcome a presumption of the petitioner's voluntariness and  
15 awareness of his rights. United States v. Butt, 731 F.2d 75, 80 n.5 (1st Cir. 1984).

16 We discussed Petitioner's rights at length during his plea colloquy. (Crim. No. 07-453,  
17 Docket No. 1765.) Petitioner testified that his plea was both knowing and voluntary and that he  
18 was consciously forgoing trial on the merits, in which he could have contested the accusations  
19 against him. (Id.) The plea agreement clearly spells out Petitioner's potential maximum liability  
20 under the offense, the facts to which he pled guilty, and his waiver of certain rights. (Crim.  
21 No. 07-453, Docket No. 1246.) Although Petitioner alleges that his attorney misled him as to the  
22 possibility of reducing the drug quantity in his plea agreement when another defendant agreed to  
23 a lower amount, there is no indication that these two defendants were in comparable situations

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1 such that they should have received equal treatment. (See Docket No. 1.) This case essentially  
2 turns on a swearing contest between Petitioner's assertions in the instant petition and his previous,  
3 sworn affirmations to this court. See Sánchez-Barreto, 93 F.3d at 23. Without proof of deception  
4 beyond Petitioner's self-serving averments (see Docket No. 1), we find that his attorney committed  
5 no error. See Butt, 731 F.2d at 80.

6 **B. Ineffective Assistance of Counsel**

7 Petitioner alleges that his sentence is unconstitutional because his counsel was ineffective  
8 in that he (1) failed to argue for a downward departure at sentencing for Petitioner's mental  
9 disorders; (2) did not fully inform Petitioner about the consequences of forgoing downward  
10 departures and waiving the right to appeal; and (3) misinformed Petitioner about the possibility  
11 of agreeing to a lower drug amount. (Docket No. 1.)

12 To establish ineffective assistance of counsel, the petitioner must show both that his  
13 attorney's performance was deficient and that he suffered prejudice as a result of the deficiency.  
14 Strickland v. Washington, 466 U.S. 668, 686-96 (1984). To demonstrate deficient performance,  
15 the petitioner must "establish that counsel was not acting within the broad norms of professional  
16 competence." Owens v. United States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.  
17 at 687-91). "[T]o prove prejudice, a defendant must establish that but for counsel's deficient  
18 performance, there is a reasonable probability that the outcome would have been different." Id.  
19 at 57-58. As to prejudice in guilty pleas, the petitioner "must show that there is a reasonable  
20 probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted  
21 on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

22 Petitioner's claims under the Sixth Amendment right to counsel can be grouped into two  
23 categories: Failure to obtain a lesser sentence and failure to fully advise Petitioner about the

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1 consequences of his guilty plea. First, Petitioner argues that his sentence would have been less  
2 severe had his attorney presented arguments for a downward departure due to Petitioner's alleged  
3 mental disorders. (Docket No. 1.) This argument cannot obtain. Once Petitioner agreed in his  
4 plea agreement to forgo further downward departures or adjustments (see Crim. No. 07-453,  
5 Docket No. 1246), his lawyer had neither the obligation nor the opportunity at sentencing to raise  
6 the issue of Petitioner's mental health. Therefore, counsel's performance was not deficient in this  
7 respect. See Owens, 483 F.3d at 57.

8 Second, Petitioner argues that counsel induced him to sign the plea agreement without full  
9 knowledge of relevant facts. (Docket No. 1.) The critical defect with this argument is that  
10 Petitioner does not allege that he would not have pled guilty, and instead would have insisted on  
11 a jury trial, but for his lawyer's intervention. (Id.) Accordingly, Petitioner fails to show prejudice  
12 as to these two claims. See Hill, 474 U.S. at 59.

#### 13 IV.

#### 14 Conclusion

15 For the foregoing reasons, we hereby **DENY** Petitioner's § 2255 petition (Docket No. 1).  
16 Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, we summarily **DISMISS** this  
17 petition, because it is plain from the record that Petitioner is entitled to no relief.

18 **IT IS SO ORDERED.**

19 San Juan, Puerto Rico, this 8<sup>th</sup> day of April, 2010.

20 s/José Antonio Fusté  
21 JOSE ANTONIO FUSTE  
22 Chief U.S. District Judge